In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES;
BOARD OF SUPERVISORS OF THE COUNTY
OF LOS ANGELES and CIVIL SERVICE COMMISSION OF THE
COUNTY OF LOS ANGELES
Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS' BRIEF

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INTRODUCTION

The County of Los Angeles, hereinafter Petitioner, has certified as error the ruling of the Court of Appeals for the Ninth Circuit that a showing of statistical adverse impact resulting from the application of an employment selection examination is sufficient to establish a *prima facie* violation of Title 42 U.S.C. §1981. In addition, Petitioner has questioned the validity of that ruling in terms of the scope and effectiveness of the racial hiring order.

As noted in more detail below, San Francisco is presently defending a lawsuit challenging its police department hiring procedures. That case is set for trial on October 24, 1978. One of the central issues in that case involves whether a *prima facie* case may be made out against San Francisco on a mere showing of statistical adverse impact in the administration and application of entry and promotional examination in the department. The constitutional conflict between Congress' power to establish national economic policy in the area of employment and state and local prerogatives to order their sovereign operations lies in the balance. And in particular the civil service merit system adopted early in this century across this country is threatened with destruction as a consequence of quota hiring which substitutes racial criteria for merit and which tends to discourage white males and those minorities who may not lay claim to the privileged status of being victimized through adverse impact from seeking advancement based on their knowledge and grasp of a police department's operations.

The merit system of public employment selection

was adopted as a reform to replace the spoils system which all too often was ethnically or racially oriented by politicians who viewed the citizenry as consisting of ethnic voting blocks. These politicians were more concerned with the political gains to be derived from public service appointments than with the individual talents of the applicants and the benefits to the public to be derived from the appointment of high quality applicants. Adverse impact standards and quota hiring orders nullify the very procedures which civil service reform sought to eliminate. Thus there is more to this case than the abstract question of what is necessary for a *prima facie* case against a public employer. What lies in the balance is the well established and soundly based civil service system of merit appointment as well as the power of state and local governments to order their affairs within the range of whole options permitted under the Fourteenth Amendment. It is to these essential issues that San Francisco addresses this amicus curiae brief.

A word of caution is also in order. The case only involves questions relating to constitutional limitations on Congressional power to regulate state and local governments in their employment practices. Congress has only prohibited "discrimination" in employment. As will be more fully developed below this prohibition should be interpreted in the context of public employers extending to and proscribing only those employee section practices of public employers which amount to constitutional violations. The EEOC in going beyond this limit has exceeded its statutory and constitutional

authority. It may very well be that in the private sector where until relatively recently racial and religious discrimination were legal and prevelant there was a need and basis for Congressional action. Intentional racial and religious discrimination by public employers and always has been, since the ratification of the Fourteenth Amendment, illegal. Enforcement of the Fourteenth Amendment through the prohibition of and specification of remedies for constitutional violations is sufficient to implement the policy of the Fourteenth Amendment while not nullifying the separate existence of the states as political entities and Federal system as contemplated by the Tenth Amendment.

The City and County of San Francisco, hereinafter San Francisco, has a vital interest in the outcome of this case. Since 1970, San Francisco has expended considerable amounts of time, money and human resources in an effort to improve the racial mix of its fire and police departments. To date the courts in the Northern District of California have consistently applied the adverse (or disparate) impact standard against San Francisco in litigation involving both the San Francisco Police and Fire Departments.[1] In both the *WACO* and the *Officers for Justice* cases, the plaintiffs challenged the written examination used to select police officers and firefighters in San Francisco on the basis

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1. See *Western Addition Community Organization v. Alioto*, 514 F.2d 542 (1975) (9th Cir.) (hereinafter referred to as "*WACO*") and the extensive detail set forth in district court decisions reported at 330 F. Supp. 536 (N.D.Cal. 1971); 340 F.Supp. 1351 (N.D.Cal. 1972); 360 F.Supp 733 (N.D.Cal. 1973); 369 F.Supp. 77 (N.D.Cal. 1973). See also *Officers for Justice v. Civil Service Commission of San Francisco*, 371 F.Supp. 1328 (N.D.Cal. 1973) and 395 F.Supp. 378 (N.D.Cal. 1975) (hereinafter referred to as "*Officers For Justice.*")

of Title 42 U.S.C. §§1981 and 1983.[2] In both *WACO* and *Officers for Justice*, the plaintiffs in establishing entitlement to relief against the written examination, relied solely on statistical evidence demonstrating an adverse impact on identifiable minorities. In both cases there was *no* evidence of any intentional discrimination and in both cases San Francisco was unable to develop an employment selection device which could pass muster under the rigorous empirical validation rules set down in the Equal Employment Opportunity Commission (hereafter, "EEOC") guidelines.[3] These guidelines were promulgated by the EEOC pursuant to Title VII, were applied in 1981, 1983 cases to exams which had all been created prior to the effective date of the 1972 amendment to Title VII, extending the statute to public employees.

As a result, in both cases injunctions were issued which effectively nullified San Francisco's professionally developed though not empirically validated examinations for police officers and firefighters. The court orders also contravened the San Francisco Charter and common law concepts of competitive examinations for civil service employment. In *WACO*, San Francisco was required to lower the passing grade on the firefighter written examination to such a level that it no longer served any useful purpose as a device for select-

2. In 1977 the *Officers for Justice* complaint was amended so as to include a cause of action based on Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. §2000e. However, all litigated issues to date have involved claims based solely on Title 42 U.S.C. §§1981 and 1983.

3. Those rules were embodied in EEOC guidelines §1607 C.F.R. After President Carter's reorganization of enforcement agencies, the EEOC issued—8/23/78 new uniform guidelines. They are not yet available.

ing competent employees. San Francisco was also required to cease using it as a ranking device. As a result, applicants were no longer ranked according to their performance on the written examination. Rather those who "made the cut" on the written examination were ranked on the basis of their performance in the physical examination and in the oral interview pursuant to court order.

And as will be demonstrated by San Francisco in its *Officers for Justice* Case, the adverse impact and quota rules have an even more devastating impact at the promotional level of the police department. As these rules are being currently applied in the San Francisco police department, they have a severe effect on those persons who have chosen to make a career of police work. Many of them have spent years preparing for promotional examinations only to be frustrated by learning that promotions in the future and under quota orders will be made on the basis of factor which bear no legitimate relationship to their merit within a civil service system. The detriment to the public is patent.

As can be seen from these facts there has been a substantial, severe, and pervasive displacement of San Francisco's Charter-mandated employment selection procedures which have never been proved to be racially biased or otherwise unconstitutional. Thus, the resolution of the Los Angeles case involving some similar facts will directly affect the *Officers for Justice* case which is scheduled for trial on October 24, 1978, as well as future possible litigation in the promotive ranks of the fire department.

OVERVIEW OF CITY'S ARGUMENT

The Petition for Writ of Certiorari ably and thoroughly analyzes all the issues posed in this case except one. It is the purpose of this Amicus Curiae brief to suggest to this Court a resolution of the constitutional issues posed in the instant case which will provide principles to guide employment selection litigation involving states and their subdivisions, both n §1981 and §1983 cases as well as in Title VII litigation.

As explained in detail below, the case involving only public employers whose employee selection procedures are subject to the Equal Protection Clause. The only rational accommodation of the conflict between Congress' enforcement power under Section 5 of the Fourteenth Amendment (or its commerce clause powers) and the concept of state sovereignty embodied in the Tenth Amendment is to conclude that in the context of state and local employers Congress may proscribe and provide remedies for practices which amount to constitutional violations. However, Congress may not go farther by regulating what are constitutional employment practices because such regulations invade essential state and local functions which are reserved by the Constitution to the states.

San Francisco suggests to this Court an additional and more constitutionally thorough ground in support of the conclusion that the "adverse impact" standard applied by the trial court and upheld by the Ninth Circuit is constitutionally unsound. It is San Francisco's contention that the adverse impact standard as a basis

for a *prima facie* case challenging employment selection examinations of state and local government employers both exceeds the constitutional standards articulated by this Court in *Washington v. Davis*, 426 U.S. 229 (1976) and violates the sovereignty of the State of California and its political subdivisions by interfering with and displacing employment selection procedures where there has been no showing of a violation of the Fourteenth Amendment. The manner in which a local government selects its employees is as much an attribute of state sovereignty as are the wages and working conditions of those employees. Thus to the extent Congress, the EEOC,[4] and the Federal courts[5] have proscribed and provided remedies for employment selection procedures of local governmental entities which do not violate the Fourteenth Amendment, they have overstepped the bounds of state sovereignty recently reaffirmed by this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The resolution of the issues presented by San Francisco in this case merits particular attention because since the filing of the firefighter cases in Los Angeles and San Francisco, Congress amended Title VII to extend its application to state and local governments.[6] It is therefore likely that all future litigation will be premised on Title VII in addition to §§1981 and 1983. The adverse impact standard relied on by the trial court

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4. See *United States v. Solomon*, 419 F.Supp. 358, 367 (1976) applying principles of the Tenth Amendment to Federal executive action interfering with state sovereign functions.

5. See *Davids v. Akers*, 549 F.2d 120, 127 (9th Cir. 1977).

6. See Pub.L. 92-261 §2(3), effective March 24, 1972.

and the Ninth Circuit is derived from Title VII cases involving private employers.[7] Thus, it becomes clear that this case cries out for a specification of the line of demarcation between Congressional power pursuant to Section 5 of the Fourteenth Amendment and its authority pursuant to the Commerce Clause, on the one hand, and the sovereign prerogative of states to adopt and implement employment procedures which do not violate the Fourteenth Amendment on the other.[8]

The single most important factual material governing the resolution of the Constitutional issues in this case lies in the finding of the trial court:

> "Neither Defendants nor their officials engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department. *To the contrary, several of defendants officially engaged in efforts to increase the minority representation in the Los Angeles County Fire Department.*" (Emphasis added.) (See Petition for Writ of Certiorari, Appendix D, p. 4.)

Very similar findings were made regarding San Francisco's attempts to integrate its fire department in *Western Addition Community Organization v. Alioto*,

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7. See *Davis v. County of Los Angeles*, 566 F.2d 1335, 1337 (Fn.4) and 1338 (9th Cir. 1977) in which the Circuit Court makes clear that it is applying the Title VII standard in the §1981 context.

8. The result may very well be that Congress, acting pursuant to the Commerce Clause may impose more rigorous standards on private employers than the Constitution allows it to impose either under the Commerce Clause or the Fourteenth Amendment on state and local governments. The relationship between the state sovereignty concept embodied in the Tenth Amendment as it relates to Congress' power under Section 5 of the Fourteenth Amendment is discussed below.

330 F.Supp. 536, 540 (N.D.Cal. 1971) and 340 F.Supp. 1351, 1356 (N.D.Cal. 1972):

> " . . . [S]econdly, *there is no doubt that the Commission, far from entertaining any intent to racially discriminate, means well and has tried in its own way to improve minority representation in the Fire Depatrment without impairing departmental efficiency*, including not only its earlier efforts to modify the Civil Service examination but also its separate and very helpful Fire Safety Technician program (under contract with EEOC) designed to help minority groups prepare themselves for eventual classification as H-2 Fireman." (Emphasis added.)

The findings of the trial court, both in the instant case and in *WACO* illustrate the essential controversy underlying the case. In adopting Title VII, Congress set a national goal of integration of the work force and sought to insure for vertical economic mobility of minorities who have traditionally been underrepresented in portions of the work force. This policy is substantially different from the underlying premise of the Fourteenth Amendment which is to eradicate all vestiges of officially enforced racial discrimination. Los Angeles and San Francisco, by their judicially recognized public efforts, have taken affirmative action to integrate their work force and to provide the very same employment opportunity which Congress in Title VII sought to promote. Nevertheless both cities are found to be in violation of law.

However, the realities at the local level pose substantial and concrete impediments to the swift achievement

of the goal of integration of which the national legislature is only remotely informed and with which in any case it need not deal on a day-to-day basis. First, there is a well-founded, socially desirable tradition of civil service employment founded on competitive examination designed to safeguard public service careers and to protect the public from the evils of political patronage systems. These principles are promulgated in local charters and ordinances, which public officials are bound by law to obey.[9]

The fact that these civil service examination procedures are set forth primarily in local charters, and in state constitutions is important. Should the court invalidate them and prevent their application on the basis of an adverse impact or statistical disparity, the state or local officials would have no laws to govern employment selection, and thus the whole operation would be taken over by the Federal court which does not have the facilities, the authority or the competence to select those who shall carry out the public undertaking.

Second, Los Angeles County, and San Francisco to an even greater degree, embody the traditional notion of the American melting pot. Both urban centers are

9. In the *Officers for Justice* case San Francisco will factually demonstrate that the quota hiring order has discouraged many police department personnel, especially white males, from seriously studying for promotional examinations. They feel that promotions will be made by the federal court on the basis of race rather than merit. Needless to say the public stands to suffer when its police department is directed by those who obtain promotion on the basis of non merit-oriented criteria. In completely undermining the merit system of employment and promotion, the court order has thrown the City back into the dark ages of the political patronage and spoils system by virtue of congressional mandate rather than local corruption.

communities containing an almost limitless variety of racial, cultural, ethnic, and religious groups. This lack of homogenity makes employment selection devices almost impossible to validate empirically and guarantees adverse impact on at least one minority group every time a test is administered. The diversity of origins of our populations and the resulting wide spectrum of varied abilities, perceptions and *weltanschauungs* mean that there are almost limitless explanations for the performance of individuals and various groups. Congress, in adopting *national* legislation, is concerned about nationwide policies which may be ill-suited to urban settings such as Los Angeles and San Francisco and which do not account for the differences between those two communities or for the differences between them and other communities throughout the country.

Finally, at the local level, governments are required in attempting to integrate their work forces to deal with the demands of those groups not falling within the classes identified as the beneficiaries of Title VII integration efforts.[10]

All these factors strongly suggest that the Fourteenth Amendment standard is practical and well conceived. Local governments and the courts can act decisively and immediately to eliminate intentional racial discriminaton. However, the more sophisticated and no less important social objectives of assuring vertical socio-economic mobility in public employment to all

10. See for example San Francisco Municipal Code Article 33 which prohibits discrimination on the basis of sexual orientation in housing, employment, and public accommodations.

segments of our society are best left to the local officials who best understand and can respond to the local problems. It is just this concept among others that the Tenth Amendment and its doctrine of State sovereignty were intended to promote.

Therefore, this whole case—and many others across this country—turns on a selection device prepared and administered in good faith and without racial or ethnic considerations which happen to result in the selection of whites at an appreciably greater rate than that for blacks and Mexican-Americans (in San Francisco Asians also passed at a higher rate). As discussed more fully below, since these facts do not constitute a constitutional violation, they may not be held to support relief pursuant to Title 42 U.S.C. §1981 for two reasons: First, Congress, in adopting §1981 sought to prohibit and provide remedies only for constitutional violations. Second, under principles of Federalism, Congress may not, either under the Commerce Clause or the Fourteeenth Amendment, regulate employment selection policies and practices of states and their political subdivisions beyond prohibiting and providing remedies for those practices and policies which amount to violations of the Fourteenth Amendment.[11]

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11. This Court has refused in the past to address this question. See *Regents of the University of California v. Bakke*, —— U.S.——, 98 S.Ct. 2733, 2755, Fn. 41 and *Dothard v. Rawlinson*, 433 U.S. 321, 324 Fn. 1 (1977). That this question continuously arises, and that public officials throughout the country as well as lower courts need guidance on this issue, cannot be gainsaid. At the very least this problem should be considered by this Court in its review and disposition of the issues posed in this case. Much time-consuming and costly litigation throughout this country may be avoided if this issue is resolved. For example, in 1972 there were 62,437 different units of local government in this country. *Lafayette v. Louisiana Power and Light*,—— U.S. ——, 98 S.Ct. 1123, 55 L.Ed.2d 364, 379 (1978).

NATURE OF BURDEN IMPOSED ON PRIVATE EMPLOYERS UNDER TITLE VII AND SECTION 1981 AS INTERPRETED BY THE NINTH CIRCUIT

The federal courts have recognized that a cause of action, or a *prima facie* case for employment discrimination under Title VII, may be stated and relief may be obtained on the basis of pleading and proving that a selection device had an adverse impact on an identifiable minority. As noted above, this standard has been incorporated into §1981 cases. Thereafter, the court must invalidate that selection device unless the employer sustains his burden of demonstrating that it serves a compelling public or business purpose. In *Washington v. Davis*, 426 U.S. 229, 246-247, 48 L.Ed. 2d 597, 611-612 (1976), this Court noted:

> "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question." (Footnotes omitted.)

See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-426; (1975) and *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971) in which this Court held that Title VII forbids the use of em-

ployment tests that have an adverse impact unless the employer meets, "the burden of showing that any given requirement has . . . a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, *supra* 7 at 432. The *prima facie* case requires that the plaintiff plead and prove that the selection device in question selects applicants for hire, promotion or discharge in a racial pattern significantly different from that of the pool of applicants.

And as noted in *Washington v. Davis, supra*, at 247:

> "However this process proceeds [judicial examination of employment selection devices] it involves a more probing judicial review of and less deference to the seemingly *reasonable* acts of administrators and executives than is appropriate under the constitution where special racial impact, without discriminatory purpose is claimed." (Emphasis added.)

In other words, where the plaintiffs proceed under Title VII this Court has ruled that Congress imposed more stringent guidelines on employers than does the Constitution (as applicable to state actions).[12] Therefore, the courts under Title VII, at least in the context of testing devices, have been given broader powers to oversee, call into question, and even invalidate executive and administrative policies of employers, which

12. Some interesting discussion in the case of *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976) is relevant. In that case this Court noted.

> *"The concept of 'discrimination,' of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant, cf. Morton v. Mancari,* 417 U.S. 535, 549 (1974); *Ozawa v. United States,* 260 U.S. 178, 193 (1922). There is surely no reason for any such inference here, see *Gemsco v. Walling,* 324 U.S. 244, 260 (1945)." (Emphasis added)

Similarly, "discrimination," has been historically tied to invidious purposes. The invocation and imposition of the compelling interest standard on a mere showing of adverse impact flies in the face of the term, "discrimination," as that word has acquired content and meaning in this country's history following the internecine war of secession.

were not or could not be questioned on the grounds that they were arbitrary, capricious, unreasonable or "discriminatory" but rather merely berause they violated a transcendental congressional policy designed to expand employment opportunities for those groups which Congress found traditionally to have been excluded even though not intentionally or irrationally.

Therefore, under Title VII the employer may administer written tests to applicants for the position of nightwatchman. That test may attempt to measure the ability of the applicant to tell time, read employment instructions, and exercise judgment relating to problems he faces on the job only if the test does not have an "adverse impact." All those types of questions seem reasonable and nonarbitrary; they are not "mere pretexts designed to effect an invidious discrimination against the members of . . . " one race. *Geduldig v. Aiello*, 417 U.S. 484, 496-497, fn. 20 (1974). However, if they have an adverse impact they may not be used unless they have been empirically validated as being job-related. This heavy burden was extended both by the trial court and the Ninth Circuit to the instant case involving a §1981 claim.

NATURE OF CONGRESS' COMMERCE POWER

That Congress, under the Commerce Clause has plenary power over all matters relating to interstate commerce is beyond dispute. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L.Ed. 23 (1824); *National Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S .1, 57 S.Ct. 615, 81 L.Ed. 893 (1936). See also *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). The limits on this power are defined by the Constitution. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976).

Thus, as to private employers engaged in interstate commerce, Congress under the Commerce Clause has the power to impose what it deems to be desirable social policy by prohibiting rational, nonarbitrary employment selection devices for the purpose of promoting employment opportunity. In other words, even if a selection device is reasonable, Congress may prohibit a private employer from using it if it happens to have an adverse impact on a group identified under 42 U.S.C. 2000(e), *et seq.*, (i.e., race, color, religion, sex, or national origin) (Cf. San Francisco Municipal Code Article 33 above) unless the employer can establish that the device serves some compelling business purpose or has been empirically validated. In litigation, once the *prima facie* case is pleaded and proved by the plaintiffs, the burden of proof of justification (and the correlative risk of nonpersuasion) shifts to the defendant. That is, on the mere showing that the selection device, without regard to its rationality, results in some adverse impact on any group identified in Title

VII, the employer in showing empirical validation must establish a compelling business purpose.

The compelling business purpose gauntlet is strikingly similar in both substance and effect to the compelling interest basis of review. It is, as a practical matter, impossible for employers to preserve their business-related policies. Once a compelling interest standard or the compelling business standard comes into play, the courts employ the "strict scrutiny" standard of review. The history of "fundamental interest" and "suspect class" cases demonstrates the devastating effect judicial intervention can have on legitimate governmental and business interests. The irony of judicial imposition of the standard is manifest. The court does not tell an employer what he may do, only that a particular device fails to pass muster under the extant compelling interest (i.e., empirical validation) standard. The judiciary, then, has the best of both worlds. Courts are given the extraordinary review and veto powers over the other branches of government; however, they are not responsible for finding solutions to the problems undertaken by other branches of government. Nor are they accountable to the people for the failure of these branches to provide effective solutions to the intractable social problems with which they are faced. In this context one is reminded of the aphoristic admonition of Judge Van Graafeiland: "A federal judge rearranging a state's penal or educational system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results." *McRedmond*

v. Wilson, 533 F.2d 757, 766 (1976), (Van Graafeiland dissenting).[13]

LIMITATIONS ON CONGRESS' POWER IMPLICIT IN THE CONCEPT OF STATES' SOVEREIGNTY SET FORTH IN THE TENTH AMENDMENT

The question then is whether the standard, as articulated in the EEOC guidelines and applied to private employers by the Supreme Court in *Griggs*, *Albemarle*, and other cases, may constitutionally by applied to a

13. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 499 (1975), Mr. Justice Blackman in his concurring opinion recognized this problem when he stated,

> "I cannot join, however, in the Court's apparent view that absolute compliance with the EEOC Guidelines is a sine qua non of pre-employment test validation. The Guidelines, of course, deserve that deference normally due agency statements based on agency experience and expertise. Nevertheless, the Guidelines in question have never been subjected to the test of adversary comment. Nor are the theories on which the Guidelines are based beyond dispute. The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that *pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity* because it has a unique capacity to measure all applicants objectively on a standardized basis. *I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.*" (Emphasis added.)

Mr. Justice Blackman clearly understands the threat to the civil service merit system posed by quota hiring. And in fact, in the public context, the result is a paradox. The public employer who cannot afford to prepare or simply does not succeed in developing an empirically validated selection device is exposed to potential liability for violation of §1981 or Title VII. He may not respond by adopting a "quota system" because such a solution would violate the Equal Protection clause and expose him to liability to the applicant who does not meet the racial qualification. *Bakke*, *supra*. Federal courts, however, have taken it upon themselves to impose quotas on public employers like Los Angeles where there has been no showing of discrimination. How the judicial branch of the federal government claims entitlement to impose quotas, a device which under due process and equal protection no other branch of state or federal government may use is at the very least difficult to understand. In any case, the result in this case was that Los Angeles' time-tested, fairly applied personnel procedures were abrogated by the federal court which compelled that employment selection decisions be made on a statistical rather than a merit basis.

municipality in light of the principle of Federalism recently mentioned and applied by this Court in *National League of Cities v. Usery*, *supra*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 245 (1976). In that case, the National League of Cities and individual state and local governmental entities brought an action challenging the validity of the 1974 amendments to Fair Labor Standards Act, which extended the minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions.[14]

The court noted the central issue in *Cities* at 426 U.S. 837, 96 S.Ct. 2467,

> "The gist of their complaint was not that the conditions of employment of such public employees were beyond the scope of the commerce power had those employees been employed in the private sector but that the established constitutional doctrine of intergovernmental immunity consistently recognized in a long series of our cases affirmatively prevented the exercise of this authority in the manner which Congress chose in the 1974 amendments."

In the instant case, it must be noted first that Title VII, insofar as it was applied to public employers, was adopted pursuant to the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Congress's power to act under the Fourteenth Amendment vis a vis state government is broader than its power to act

14. The original Fair Labor Standards Act passed in 1938 specifically exempted states and their political subdivisions from its coverage. 29 U.S.C. §203d (1940 ed.).

pursuant to the Commerce Clause.[15] However, there are limits to that power and it is the purpose of this analysis to suggest that in the area of employment selection those limits are defined by the Fourteenth Amendment.

The gist of San Francisco's contention in the instant case is that, except to the extent that Los Angeles's employment selection procedures violate the provisions of the Fourteenth Amendment, those employment selection procedures are beyond the scope of Congressional power to implement the Fourteenth Amendment because of the established constitutional doctrine recognized in many cases of the United States Supreme Court including the most recent decision of *National League of Cities v. Usery, supra.*

Initially, the pertinent statutory regulations must be reviewed in order to determine what regulations are sought to be imposed. This analysis must begin by reference to Title VII and related statutes. Title VII is codified in Title 42, §2000e *et seq.* The basic prohibitions relevant to this case are set forth in Title 42, §2000e-2(a)(1) which provides,

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

15. See for example Christensen & Charleston School District 558 F.2d 1169, 1171-1172 (1972) (4th Cir.) upholding the validity of the Equal Pay Act as a exercise of Congressional power pursuant to Section 5 of the Fourteenth Amendment. But see Usery v. Owensporo-Daviess Co. Hospital 423 F. Supp. 843, 845-846 (W.D. Ky) (1976). (Cities controlling an issue of application of Equal Pay Act to States.)

> terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . . "[16]

The key language is the prohibition against failing or refusing to hire or discharge an employee or otherwise discriminating on the basis of race, color, religion, sex or national origin. Cognate prohibitory language is applied by §2000e-2 and other subsections to employment agency practices (b), labor organization practices (c) and training programs (d). See also §2000e-3. However, the critical term in Title VII is "discriminate" in terms of race, color, religion, sex, and national origin.

§1607.3 of the EEOC guidelines defines discrimination as follows:

> "The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, *and* (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use." (Emphasis added.)

The standards set forth in these guidelines have already been adopted by courts as applicable to private employers and subsequently extended in §1981 cases

16. In 1972 the Civil Rights Act of 1964 was amened by Equal Employment Opportunity Act, extending Title VII coverage to state and local government employees.

to public employers. See *Griggs v. Duke Power Co., supra, Albemarle Paper Co. v. Moody, supra.*

However, the initial legislation was sought to be imposed on employers in private industry. Pursuant to its powers under the Commerce Clause, Congress has plenary power to regulate interstate commerce. Therefore, a selection procedure which *appears reasonable and has been effectively and in good faith used in the past* may be rendered unacceptable because Congress has articulated as a paramount goal, the "equalization" of employment opportunities in interstate commerce. In other words, Congress[17] has declared as a matter of policy that otherwise rational, fairly applied and well-accepted employment selection practices may not be used if those devices operate against certain identifiable minorities to a greater extent than they operate against the majority population unless those devices have been empirically validated as being job related or in some other way are shown to serve a compelling public purpose and *no other alternative exists.*[18] This policy, in essence, reverses the normal burden of proof.

Once a *prima facie* case is stated, the selection device falls, absent evidence of empirical validation or a com-

17. It is not certain, at all, whether Congress, in using the term, discriminate," in its prohibition, really intended to go so far as EEOC has gone in its guidelines.

18. This principle was explained in *Albemarle Paper Co. v. Moody, supra,* 422 U.S. 405, 425. After discussing what constitutes a *prima facie* case and how an employer may defend by showing that the test is job related, this Court made clear just how far the Congressional policy goes when it stated,

> "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." (Citations omitted)

pelling business purpose and absent a showing that no alternative, less "discriminatory" device exists. The rejected applicant need not show the selection device to be arbitrary or unreasonable—he or she need only show the adverse impact. The question here is whether that policy may be imposed upon the states.

EQUAL PROTECTION CLAUSE IN EMPLOYMENT DISCRIMINATION CONTEXT

In *Washington v. Davis, supra,* 426 U.S. 229 (1976) the United States Supreme Court ruled on a case involving two individuals whose applications to become police officers in Washington, D.C., had been rejected. They brought action pursuant to 42 U.S.C. 1981 (at the time they brought their action, Title VII had not yet been extended to governmental employers such as the District of Columbia). The plaintiffs had contended that the written examination bore no reasonable relationship to job performance and excluded a disproportionately high number of black applicants. The trial court first noted the absence of any claim of intentional discrimination. (Likewise in the instant case the trial court, as noted above, specifically found that

If this standard were applied to states, not only would the adverse impact rule upset the presumption of validity accorded by Federal courts reviewing state actions under the Fourteenth Amendment, *McGowan v. Maryland,* 366 U.S. 420 (1960) but it would also upset the normal deference arising from both the Federalist nature of our system and from the doctrine of separation of powers pursuant to which Federal courts refrain from substituting their judgment for that of the states or striking down a state policy because it does not operate with absolute mathematical nicety. *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61, 65 (1910)

there was no intentional discrimination on the basis of race.) The plaintiffs' claim centered on the arbitrary nature of the selection device, by virtue of its adverse impact of on the members' class caused by its application.

Initially this Court noted in *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047,

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."

Then this Court concluded at 426 U.S. 242 96 S.Ct. pp. 2048-2049,

> "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is

very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. *Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.*" (Emphasis added.)

This Court discussed the policy implication of the *Davis* case at 422 U.S. 242, 245-246, 96 S.Ct. 2040, 2050,

> "Both before and after *Palmer v. Thompson*, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement. As

an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. *Test 21, which is administered generally to prospective government employees, concedely seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing.* Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits. Nor on the facts of the case before us

would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. *As we have said, the test is neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue.* Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated and inference that the Department discriminated on the basis of race or that a 'police officer qualifies on the color of his skin rather than ability.'" 348 F. Supp., at 18. (Footnote omitted.) (Emphasis added.)

And then this Court compared the *Davis* case with Title VII at 426 U.S. 229, 247-247 96 S.Ct. 2040, 2051,

> "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the

qualifying tests are appropriate for the selection of qualified applicants for the job in question. *However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.*" (Emphasis added.) (Footnote omitted.)

The question then is whether the trial court applied the proper standard of review in evaluating the selection procedure of the Los Angeles County Fire Department. If the *Griggs* selection criteria taken from Title VII guidelines are applicable, then the plaintiffs made out a *prima facie* violation.

LIMITS OF CONGRESS' POWER SET FORTH IN THE CONSTITUTION
THE DOCTRINE OF STATE SOVEREIGNTY

It is submitted that §1981, to the extent that it is read to go beyond prohibiting and providing remedies for constitutional violations is unconstitutional as applied to the states and political subdivisions thereof.

This contention is based on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, *supra*. In the *Usery* case the plaintiffs had challenged amendments to the Fair Labor Standards Act extending the Act's coverage to state and local government employers, including states and political subdivisions thereof.

(See 29 U.S.C. §§213a and 2034.) These amendments parallel the amendments of 1972 to Title VII extending that Act's coverage to public employers. The governmental entities contended that the amendments extending the minimum wage and maximum hour requirements to them as state and local government employers would intrude upon the state's performance of an essential governmental function.

It is contended in the instant case that the application of Title VII standards, to the extent that they go beyond requiring the states to comply with the Fourteenth Amendment, intrudes upon Los Angeles's performance of an essential governmental function by preventing Los Angeles from using rational, generally acceptable employment selection procedures to obtain the best qualified civil servants in its fire department, a traditional government operation.

With regard to the issue of the power of the Congress to regulate interstate commerce, this Court in *Usery* stated at 96 S.Ct. 2468-2469,

> "It is established beyond per adventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress. That authority is, in the words of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 6 L.Ed. 23 (1824), ' . . . the power to regulate; that is to prescribe the rule by which commerce is to be governed.' Id., at 196. When considering the validity of asserted applications of this power to wholly private activity, the Court has made it clear that '[e]ven activity that is purely intrastate in character may be regulated by Congress, where the

activity combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.' *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975). Congressional power over areas of private endeavor, even when its exercise may preempt express state law determinations contrary to the result which has commended itself to collective wisdom of Congress, has been held to be limited only by the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.' " *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964).

Similarly, Congress' powers pursuant to the Fourteenth Amendment to regulate, prohibit, and provide remedies for constitutional violations is broad.

In fact, in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 10 L.Ed.2d 828 (1965), the Supreme Court held that under §5 of the Fourteenth Amendment Congress had the power to pass appropriate legislation to implement the dictates of the Equal Protection Clause and to adopt implementing legislation which may, under very limited circumstances as discussed below, reach more broadly than the Equal Protection Clause itself.[19] Therefore, in *Katzenbach v. Morgan, supra*, this Court upheld that portion of the 1965 Voting Rights Act which provided that no person who had successfully completed the sixth primary grade in a public school or in a private school accredited by the

19. Section 5 of the Fourteenth Amendment provides, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote in any election because of his inability to read or write English.[20]

New York City had objected to this legislation on the grounds that New York election laws had a literacy requirement which had not been shown to be a pretext for unconstitutional denial of the right to vote. The court based its decision on §5 of the Fourteenth Amendment and on the Commerce and Supremacy Clauses.

In *Bakke, supra*, this Court eschewed the very question San Francisco is posing herein when it stated, at 98 S.Ct. 2755, fn. 41,

> "Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.* (Emphasis added.)

It is clear then that the extraordinary Congressional powers affirmed by this Court in *Morgan, supra*, must be based on special findings.

The "special findings" of Congress referred to above

20. See 79 Stats. 439, 42 U.S.C. 1973b.

were discussed in *Morgan, supra,* at 384 U.S. 652. Relying on the legislative history of the Voting Rights Act of 1965, this Court noted that the legislation was specially tailored to a specific ethnic group (Puerto Ricans) who had been educated under special circumstances (American Flag schools) in a United States territory and who had subsequently migrated to the United States. In the Congressional hearings, the special thrust of this legislation was discussed at length. See 384 U.S. 645, fn. 3. It is clear under these special circumstances that Congress could have concluded that it would be a denial of equal protection not to allow citizens to vote who had been educated in American Flag schools.

In contrast, the legislative history preceding the extension of Title VII to state and local governments demonstrates no special Congressional attention for an insular minority. There is in the legislation no special finding or declaration of policy. A review of the legislative history (see H.R. 92-238, appearing in U.S. Code Cong. and Admin. News, 1972, v. 2, p. 2152, *et seq.*) indicates that there is a general public problem of employment discrimination in state and local governments. However, the report on which the Committee relied, indicates that each community in this country faces special and unique problems; and, indeed, the report notes many instances wherein state and local governments had made substantial progress in the area of equalization of employment opportunities. (See U.S. Civil Rights Commission, "For All the People . . . By All the People, a Report on Equal Opportunity in

State and Local Government," July, 1969.)

It becomes clear upon a reading of that report, that there was no basis for a Congressional finding that a nationwide, blanket rule more stringent than the Equal Protection Clause of the Fourteenth Amendment was necessary or even desirable. Absent a clear specification of intent, this Court should be extremely reluctant to attribute to Congress either the desire to go beyond prohibiting and providing remedies for Fourteenth Amendment violations or so eliminate the options of state and local government in integrating their work forces. Such a crippling of those governmental employers who have in good faith acted affirmatively to integrate their work forces flies in the face of the equal protection tradition which recognizes that out of the crucible of diverse solutions to problems great social wisdom can be drawn. As noted in *Cities*, one critical criterion in the determination as to whether a federal enactment robs the states of their sovereign powers is the extent to which the capacity of the states to solve their problems has been impaired.

The legislative history of the extension of Title VII to state and local governments therefore supports San Francisco's contention that there is no basis for the conclusion that Congress made special findings so as to justify proscriptions and remedies broader than those to be invoked under the Fourteenth Amendment.

The importance of special findings in establishing the line of demarcation between Congressional power under Section 5 of the Fourteenth Amendment and State sovereignty embodied in the Tenth Amendment

was made clear in *Oregon v. Mitchell* 400 U.S. 11, 27 L.ED.2d 27 (1970). In that case this Court upheld that portion of the Voting Rights Act Amendments of 1970, Pub L 91-285, 85 Stat. 314, which lowered the minimum voting age in *federal* elections. However, this Court held invalid Congress's attempt in that Act to lower the minimum voter age in *state and local* elections. In announcing the judgment of this Court, Mr. Justice Black relied on the fact that

> "Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race . . . Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in State and local elections. On the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on the basis of race." *Oregon v. Mitchell, supra*, 400 U.S. 112, 130, 27 L.Ed.2d 272, 284.

The *Davis* case provides an additional basis for this contention. That case, like the instant case, was filed on the basis of Title 42, §1981. In *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (1972) the court noted that §§2000e, *et seq.*, prohibiting "discriminatory" employment practices is parallel to §1981 though broader in that it extends to other forms of "discrimination" than racial discrimination to which §1981 is solely directed.

However, in the context of what Congress sought to do, it is persuasive that this Court in *Washington v. Davis, supra*, refused to conclude that Congress had gone so far in §1981 as to prohibit racial discrimination which manifests itself only in terms of adverse impact. By applying the rationale of the *Katzenbach* case this Court could have held that §1981, being implementing legislation adopted by Congress, "may reach more broadly than the Equal Protection Clause itself." Therefore, the Court refused in the *Davis* case to expand the definition of "discrimination" even in a context where the constitutional limits of federalism would have imposed no barriers (District of Columbia being subject to the exclusive jurisdiction and control of the Congress). It is submitted that if the Court refused to give an expanded definition to "discrimination" in *Davis*, then it necessarily follows that this Court should be doubly reluctant to accept such an expanded definition of the term when, in addition to the limitations in terms of what the drafters of the Fourteenth Amendment sought to proscribe,[21] there is the affirmative constitutional constraint on the power of Congress to regulate the sovereign functions of the state.

Therefore, it must be concluded that the powers of Congress to adopt legislation pursuant to §5 of the Fourteenth Amendment is similar to the power of Con-

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21. It is recognized that §1981 was adopted initially in the Civil Rights Bill of April 9, 1866, C. 31, §1, 14 Stat. 27 pursuant to the power invested in Congress by §2 of the Thirteenth Amendment,"... to enforce this article by appropriate legislation." *Ex parte Riggins*, 134 F.404 (1904) reversed on other grounds 199 U.S. 547, 50 L.Ed. 303. However, since Congress was vested with the same power under §2 of the Thirteenth Amendment as it was under §5 of the Fourteenth Amendment, the argument based on *Washington v. Davis*, is persuasive.

gress to adopt legislation pursuant to the Commerce Clause. Just as in the Commerce Clause cases, Congress has plenary power to regulate activities if those activities may have an effect on interstate commerce; so too, under the Fourteenth Amendment, Congress may regulate activities which may, in and of themselves, not constitute a denial in equal protection of laws if such regulations further the purpose of securing equal protection of the laws for disadvantaged citizens.[22]

However, in *Usery* this Court noted that there were limits to Congress' power under the Commerce Clause. Said this Court at 426 U.S. 833, 840-844, 96 S.Ct. 2469-2471,

> "Appellants in no way challenge these decisions establishing the breadth of authority granted Congress under the commerce power. *Their contention, on the contrary, it that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), or the Due Process Clause of the Fifth Amendment, *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532,

22. What device could more effectively secure for citizens educated in American flag schools their constitutional right to equal protection of the laws than the opportunity to participate in selecting the law makers and otherwise participating in the electoral process. See *Katzenbach v. Morgan, supra.*

23 L.Ed.2d 57 (1969). Appellants' essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers. This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution . . . In *Fry, supra,* the Court recognized that an express declaration of this limitation is found in the Tenth Amendment: 'While the Tenth Amendment has been characterized as a "truism," stating merely that 'all is retained which has not been surrendered,' *United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system . . . ' 421 U.S. at 547, 95 S.Ct., at 1795." *Id.*, at 76. (Footnotes omitted.) (Emphasis added.)

Accordingly, it cannot be doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise broad[23] power to enforce the Fourteenth Amendment. That this limit exists was thoroughly discussed in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In that case this Court recognized that since the Fourteenth Amend-

23. No case has been uncovered which describes the power of Congress under §5 of the Fourteenth Amendment as "plenary."

ment was in the Constitution it must be read as a compromise of state and local governmental prerogatives (in that case the Eleventh Amendment was involved). The only way to give content and meaning to both the Equal Protection Clause of the Constitution and the concept of Federalism embodied in the Tenth Amendment is by concluding that Congress may "invade" what otherwise might have been within the ambit of state prerogative when it seeks to proscribe and provide remedies for constitutional violations. Conversely, Congress may not exact from states adherence in their employment selection procedures to standards which go beyond those in the Constitution. A reading of the Fourteenth Amendment as authorizing Congressional action directed at non-constitutional discrimination would accord to it more constitutional significance than its drafters intended. There is no indication that the Fourteenth Amendment was intended to go beyond abolishing racial and other forms of discriminatory prejudice. It must be concluded that the federal system of government imposes definite limits on the authority of Congress to regulate the activities of states by means of the power vested in it by §5 of the Fourteenth Amendment. The question here is whether §1981 has been unconstitutionally applied to states and their subdivisions as employers. The concept of federalism in our Constitution also incorporates the Fourteenth Amendment which imposes specific prohibitions on the states as states. If the federal nature of our system is to retain any of its viability, the power of Congress in §5 of the Fourteenth Amendment must be

limited to prohibiting, and providing remedies for, violations of the Fourteenth Amendment when the regulations impinge upon the state's exercise of its sovereign functions.

This Court in *Usery* noted at 426 U.S. 844-845, 96 S.Ct. 2471,

> "In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384 (1926), the Court likewise observed that 'neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.' Id., at 523, 46 S.Ct., at 174.
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> "Appellee Secretary argues that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regulation of the private sector, have already curtailed the sovereignty of the Stats quite as much as the 1974 amendments to the Fair Labor Standards Act. We do not agree. *It is one thing to recognize the authority of Congress to enact laws regulating individual business necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.*" 221 U.S., at 565, 31 S.Ct., at 689." (Emphasis added.)

Therefore, it is submitted that §1981, to the extent it is read to extend beyond prohibiting and providing remedies for constitutional violations, is not invalid because of a lack of an affirmative grant of legislative authority, but because the Constitution prohibits Congress from exercising its power to impair exercises of sovereign powers by the States. The Fourteenth Amendment did indeed compromise the "sovereignty" of the states *but only* to the extent that it imposed limitations on the power of the several states tantamount to the Bill of Rights with the addition of the Equal Protection concept.[24] In *Usery* this Court noted at page 845,

> "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours these persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve in this case, then, is whether these determinations are 'functions essential to separate and independent existence.' *Coyle v. Smith*, *supra*, at 580, 31 S.Ct., at 695, quoting from *Lane County v. Oregon*, *supra*, 7 Wall. at 76, 'so that Congress may not abrogate the State's otherwise plenary authority to make them.' "

It is clear that selection criteria for determining who shall be governmental employees to carry out the public business are undisputed attributes of sovereignty. The

24. Indeed the Due Process Clause of the Fifth Amendment has been held to impose on the federal government the same restrictions articulated in the Equal Protection Clause, *Bolling v. Sharp* 347 U.S. 497, *supra*.

question, then, is whether the state's power to determine criteria for employee selection and dismissal are "functions essential to the separate and independent [state] existence . . . "[25]

One factor noted in *Usery* in determining whether the legislation violated the sovereignty of the states was the substantial increase in costs to the states if the minimum wage and maximum hours limitations were applicable. The §1981 limitations applied by the trial court and by the Ninth Circuit require municipalities to forego time-tested and rational selection procedures thereby resulting in increased personnel costs incident to training and dismissing employees who fail to perform satisfactorily for reasons which could have been predicted based the rejected criteria.[26] Furthermore, there are less easily measurable, but certainly significant costs to the public in terms of not having the best qualified people to do the job. In addition, Los Angeles' services may be impaired and the County could be exposed to liability for actions or failures to act which also could have been predicted and avoided but for the §1981 limitations.[27] [28] One important consideration, implicit in a reasonably conceived employee selec-

25. Just as this Court in *Usery* undoubtedly would have upheld legislation prohibiting a pay scale which gave higher wages to whites than nonwhites, likewise, in the instant case it is conceded that Congress may prohibit and provide remedies for state governmental employment selection procedures which deny equal protection of the laws.

26. Whereas the employment examination held invalid by the trial court in the instant case was based on some rational attempt to select the most qualified applicants for the position of firefighters, the quota hiring order, following a determination of adverse impact, is based exclusively on statistical, racial criteria and does not even purport to select the most qualified applicant for the job.

27. As noted, Title VII as written by Congress merely prohibits "discrimination." However, what is being applied are the guidelines developed by EEOC from a reading of the legislation. That EEOC may have gone

tion examination, is the need for efficient, cost-effective employees. To the extent Congress (or the EEOC) supplants the power to make determinations of how best to measure efficiency and effectiveness, it necessarily follows that the cost of delivering the governmental services will be increased and, correlatively the quality of the product will decline.[29] That one can at best only speculate on these costs speaks[30] cogently for a conclusion that Congress should not regulate in the area beyond prohibiting and providing remedies for constitutional violations.

Empirical validation as contemplated by the EEOC guidelines is an extremely costly and time-consuming

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beyond what was legitimately intended by Congress to constitute "discrimination" is a powerful question. See *General Electric v. Gilbert, supra.*

28. California Civil Code §§2100-2104, for example, impose special duties on common carriers who are held to the duty of utmost care and diligence to the public. *Fisher v. Southern Pacific Railroad Co.*, 89 Cal. 399, 26 P. 894. Common carriers can be held responsible for any, even the slightest, negligence, and are required to do all that human care, vigilance and foresight reasonably can do under all the circumstances. *Acosta v. Southern Calif. Rapid Transit Dist.*, 2 Cal.3d 19, 84 Cal.Rptr. 184, 465 P.2d 72. If a municipality seeking to select bus drivers gets caught up in the nightmare of the adverse impact—empirical validation labyrinth, it very well may give up and submit to a consent decree pursuant to which employees are selected on the basis of racial roulette. Clearly it is less likely that chance will give the municipality bus drivers who will meet these standards. That Los Angeles should be required to select its future firefighters on such a basis is to deny, on the basis of hypertechnical constitutional casuistry, the very foundations of organized social order and the social contract.

29. In light of Proposition 13, amending the California Constitution and limiting the powers of local governments to raise revenues, the cost of delivery of governmental services becomes a predominant consideration to the County of Los Angeles.

30. Another clear increased personnel cost would be the expense of conducting validation studies which would pass muster under the EEOC empirical validation guidelines. In addition, if the municipality succeeds in passing this hurdle it must still anticipate and respond to the potential claim that there are other equally effective selection devices which would not have a disparate impact and which therefore should be used. The rejection of a validated selection device in such a case would add waste onto increased cost.

undertaking when it is at all possible.[30a] With most job categories the number of appointees is so small as to provide no reliable basis for an empirical validation study.

Then this Court in *Usery* went on to discuss other factors which weigh in determination as to whether the state's sovereignty has been invaded. Said this Court at 426 U.S. 833, 847-8452 S.Ct. 2465, 2472-2473,

> "Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the States *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress. It may well be that as a matter of economic policy it would be desirable that States, just as private employers, comply with these minimum wage requirements. But it cannot be gainsaid that *the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators* as to how they wish to structure pay scales in state employment . . . The only 'discretion' left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that

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30a. The U.S. Civil Rights Commission itself has recognized that "[t]est validation is a complicated, expensive, and time-consuming operation under the best of circumstances" and "is even more difficult" in "a traditional civil service system." "For All the People . . . By All the People," *supra.*

complement to a number which can be paid the federal minimum wage without increasing revenue.

"This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers . . . *The difference, however, is that a State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy. Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458,93 L.Ed. 513 (1949) (Frankfurter, J., concurring), *but is itself a coordinate element in the system established by the framers for governing our federal union.*

"*The degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty can be seen even more clearly upon examining the overtime requirements of the Act . . . We do not doubt that this may be a salutary result, and that it has a sufficiently rational relationship to commerce to validate the application of the overtime provisions to private employers. But, like the minimum wage provisions, the vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.*

"*This congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments arranged their affairs* . . . Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermis-

sibly interfere with the *integral governmental functions* of these bodies . . . *their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection . . . These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.* Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their system for performance of these functions must rest, we think there would be little left of the States' separate and independent existence.' . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that *insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions*, they are not within the authority granted Congress by Art. I, §8, cl. 3." (Footnotes omitted.) (Emphasis added.)

Similarly, the application of Title VII standards in the context of the instant case "displaces state policies regarding the manner in which they select those charged with the responsibility for the 'delivery of these governmental services which the citizens require.' "

Likewise, "It may well be that as a matter of . . . [social] policy it would be desirable that states, just as

private employers, comply with . . . [Title VII adverse impact standards]. But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the states' elected officials and administrators as to how they wish to structure . . . [employment selection criteria] in state employment." As a practical matter, the state is left with no real choice. The local government may stop using the time-tested employee selection device as a selection criterion and start selecting its employees on the basis of race, or it may abandon the public undertaking.

In a similar manner, "This congressionally imposed displacement of state decisions [relating to selection criteria] may substantially restructure traditional ways in which local governments have arranged their affairs" by nullifying the civil service merit system based on competitive examinations. And it can only be concluded that the trial court's incorporation of Title VII standards into this Section 1981 case, to the extent that that incorporation attempts to extend beyond prohibiting and providing remedies for constitutional violations, significantly alters and displaces local governments' ability to select those persons most qualified to perform services in such traditional governmental functions as fire protection and police protection. If the "adverse impact" rule is allowed to be applied to such an integral operation as employee selection, then there will be little left of the states' "separate and independent existence." And clearly the regulation in question would impair the states' "ability to function effectively within a federal system."

Lying behind this principle is the Supreme Court's conception of the Fourteenth Amendment, its purport and intent, its scope and potency. The judiciary does not view the Fourteenth Amendment as a tool which enables the federal courts under the guise of the equal protection to control the administration of governments by the states. *Younger v. Harris*, 401 U.S. 37, 44 (1971). See also *Oregon v. Mitchell, supra*, at 400 U.S. 112, 126-127, 27 L.Ed.2d 272, 287 (1971) where Mr. Justice Black stated,

> "While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race, . . . *it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.* On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." (Footnote and citations omitted.) Emphasis added.)

This decision further reinforces San Francisco's contention that this Court cannot interfere with its employment selection procedures which are an intimate part of self government. And the equal protection

standard as noted in *Washington v. Davis, supra,* is not violated by *rational* selection criteria merely because they result in some adverse impact.

CONCLUSION

If §1981 (incorporating Title VII and EEOC guidelines) violates the sovereignty of the state to the extent that it goes beyond Equal Protection Clause limitations then it is submitted that *Washington v. Davis, supra,* provides the standard for review of employment selection devices of governmental entities. *Washington v. Davis,* quoted extensively above, holds that a *prima facie* case of a Fourteenth Amendment violation may not be pleaded and proved on the basis of "adverse impact." This Court held that the plaintiff must plead and prove intent to discriminate, and that allegations and evidence of adverse impact, though acceptable as one element of a claim, do not alone make out a Fourteenth Amendment violation. In the instant case plaintiffs only pleaded and proved adverse impact. It is submitted that the trial court erred in concluding that plaintiffs had made out a *prima facie* case. Accordingly, a §1981 claim resting on proof of statistical disparity should be deemed insufficient as a matter of law.

In the instant case, the plaintiffs introduced insufficient evidence to sustain their burden of overcoming the presumption of validity that attached to the Los Angeles County examination to qualify firefighters by showing that that examination was arbitrary or that it was animated by an intent to discriminate on the basis of race. And since the standards applied by the

trial court and upheld by the Ninth Circuit constituted a pervasive and unconstitutional invasion of state prerogative, that decision of the Ninth Circuit must be reversed.

Therefore, the decision of the Ninth Circuit should be reversed and the case remanded with appropriate directions from this court.